83-1527

IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1984

CHRISTOPHER HALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

John T. Skolfield, Jr.
501 Park Avenue South
Post Office Drawer 1510
Winter Park, Florida 32790
305/647-1576
Attorney for the Petitioner

Of Counsel:

Kirk N. Kirkconnell
Muller, Kirkconnell & Lindsey, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
305/645-3000

IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1984

_____

No.

CHRISTOPHER HALL

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

_____

QUESTION PRESENTED FOR REVIEW

I. Was the warrantless search of the petitioner's truck legally parked in a parking lot surrounded by government agents and seized after the petitioner was in police custody miles away improper since there

were absolutely no exigent circumstances present to justify the warrantless search in violation of the Fourth Ammendment?

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TABLE OF AUTHORITIES

Petitioner, CHRISTOPHER HALL, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Eleventh Circuit Court of Appeals entered in these proceedings on October 3, 1983, rehearing denied on November 17, 1983.

OPINIONS BELOW

The opinion of the United States Eleventh Circuit Court of Appeal on the direct appeal on the Petitioner's conviction and sentence is reported as United States v. Hall, F.2d (11 Cir. 1983), and is attached as Appendix A.

JURISDICTION

The opinion and judgement of the United States Eleventh Circuit Court of Appeal was entered on October 3, 1983. A timely Motion for Rehearing was denied on November 17, 1983 (attached as Appendix B).

QUESTION PRESENTED FOR REVIEW

The warrantless search of the Petitioner's truck legally parked in a parking lot surrounded by government agents and seized after the Petitioner was in police custody miles away was improper since there were absolutely no exigent circumstances present to justify the warrantless search in violation of the Fourth Ammendment.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Ammendment to the Constitution of the United States which provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question as to the illegality of the search of Petitioner's truck was raised initially be-

fore trial in a Motion to Suppress the evidence seized from the truck based on a violation of the Fourth Ammendment (R-25-27).[1] A pre-trial suppression hearing was held and Petitioner's Motion to Suppress denied (S-1-305;R-97). During Petitioner's trial when the Respondent attempted to present evidence concerning the marijuana found in the truck, pursuant to customs' agents search of same, the Petitioner objected and renewed his previously filed

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[1] The Record on Appeal in this case consisted of one volume of the Record, two volumes of Transcripts, a separate volume of the Hearing on Petitioner's Motion for Judgement of Acquittal or New Trial and Sentencing, as well as various exhibits for the Respondent. References to portions of the Trial transcript shall be prefaced by "T", followed by the appropriate page number. The record consists of the pleadings, motions and orders pertaining to the Petitioner. Citations to items contained in the Record will be prefaced by "R", followed by the appropriate page number. References to the Transcript of the Motion for Judgement of Acquittal or New Trial and Sentencing shall be referred to by "N", followed by the appropriate page number. References to exhibits entered into evidence will be prefaced by "E", followed by the appropriate page number.

Motion to Suppress the evidence, the court again overruling the defense motion (T-95). After the Respondent rested, Petitioner moved for Judgement of Acquittal, again renewing his motion to Suppress (T-175-181). At the close of all the evidence, Petitioner again renewed his Motion for Judgement of Acquittal which included the argument that the search of the truck was made in violation of the Fourth Ammendment, the court again denying said Motion (R-222). Petitioner's post-trial motions re-raised the same issue and were again denied (N-1). Petitioner raised again the constitutional illegality of the search of his truck before the United States Eleventh Court of Appeal but the court affirmed Petitioner's conviction (Appendix A).

STATEMENT OF THE CASE

A. The Facts

The facts necessary to argument of the issues are stated in the panel decision of the Eleventh Circuit Court of Appeal (Appendix A) and summarized

as follows:

> The record indicates that DEA agents began following James Wolfe, a suspected drug smuggler and dealer, as he arrived at the Tampa International Airport. Wolfe departed the airport in a gray Buick Riviera and arrived at the Econo Travel hotel in Sarasota shortly after 1:00 a.m. on July 29, 1982. At that time, agents observed a Ryder Truck located in the southeast corner of the parking lot. Defendant had rented the truck on July 28 and had agreed to return it on July 30. The Riviera left the Econo Lodge at approximately 2:30 a.m. but returned at about 10:30 a.m. Shortly thereafter, the individuals in the Riviera went to the truck. An individual, identified as defendant, entered the truck's cab and pulled away behind the Riviera. The truck and the Riviera took "what seemed to be evasive actions looking for surveillance..."

Agents followed the two vehicles to a private residence located south of Coleman, Florida. While agents met at a small park approximately one mile north of the residence, a black Cadillac, registered to defendant's father, Bernie Hall, drove slowly by the agents. The Cadillac then returned to the residence. Five or ten minutes later, the Ryder truck left the residence followed closely by a blue Chevrolet registered to defendant's brother, James Hall. The truck, driven by defendant, began exceeding 55 mph speed limit, while the Chevrolet was traveling 30-40 mph. Consequently, the truck began outdistancing the surveillance unit which was following the two vehicles. The Chevrolet thwarted repeated efforts by the surveillance unit to pass the Chevrolet by crossing the center line. The agents eventually passed the Chevrolet and, traveling 75-80 mph, caught up with the truck. Upon approaching the truck,

the Chevrolet began flashing its headlights off and on.

The truck proceeded to the Lake Hills Shopping Center where defendant parked the vehicle in an isolated area and proceeded to a nearby McDonald's restaurant. Defendant Hall remained in the restaurant for approximately one hour, always in view of the truck. DEA Agent Adams decided to enter the restaurant. While walking by the truck, she smelled the odor of marijuana emanating from the vehicle. Hall then left the restaurant, made several phone calls, waited for approximately forty-five minutes (facing the parked truck), was met by a white car which he entered, and departed. Authorities followed the white car.

Upon orders from DEA agent Adams, a uniformed Florida Highway Patrol trooper stopped the white car to identify Hall. Defend-

ant identified himself and was advised of his Miranda rights. The officers permitted Hall to leave but were then told to return him to the shopping center. The officers told Hall that he was not under arrest at that time but suggested that he return to the parking lot. Hall agreed to return; he was not arrested, handcuffed or searched but was not free to leave.

Arriving at the truck, Hall approached agent Serra and asked the agent what he smelled. When Agent Serra asked for the keys to the truck, Hall indicated that he did not have the keys. Hall held out his hands simulating the handcuff position and said, "arrest me, arrest me." Hall volunteered that he could not smell marijuana. The district court found as matter of fact that these remarks were unsolicited and not a result of questioning.

> Agent Serra obtained a tire tool in order to remove the lock but found the tool unnecessary since the lock was turned upside down and never latched. Upon opening the unlocked door, agents saw approximately 3,000 pounds of marijuana.

Initially, there was no dispute that the search of the Ryder truck was conducted without a warrant and without the consent of the Petitioner. At the time that the Ryder truck was actually seized, the Petitioner had not been in or around it for approximately two hours and the Petitioner was in custody of the police.

B. Trial Proceedings

Petitioner filed a Motion to Supress the marijuana seized from the Ryder truck he was driving prior to the search and seizure of same, with accompanying Memorandum (R-25-27). Petitioner argued that the Respondent should have attempted to obtain a warrant for the search of the truck in which the marijuana was found (R-38-41). A supression hearing was held concerning Petitioner's Motion to Supress, the court

denying same (R-97).

The jury trial of the Petitioner on the charge in the indictment took place over the three-day period from October 18, 1982, to and including October 20, 1982. Petitioner's initial jury trial ended with a hung jury and a mistrial was declared.

Petitioner subsequently had his second trial, commencing on November 15, 1982, resulting in a verdict of guilty as charged. Petitioner was sentenced on December 21, 1982 to five years imprisonment (R-169).

C. The Direct Appeal

The Eleventh Circuit Court of Appeal unanimously affirmed Petitioner's conviction. However, the Eleventh Circuit reversed the trial court's finding that the Petitioner did not have standing to contest the search of the truck. However, the Eleventh Circuit rejected Petitioner's argument that the police

officers should have obtained a warrant prior to the search of the truck.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

That the Eleventh Circuit's Opinion that the warrantless search of the Petitioner's truck which was legally parked in a parking lot surrounded by Government agents and seized after the Petitioner was in Police custody miles away was proper, is in conflict with the decisions of other Federal Courts of Appeal on the same matter and has so far departed from the accepted and usual course of Judicial proceedings to call for an exercise of this Honorable Court's power of supervision.

The panel decision of the Eleventh Circuit in the instant case is in direct conflict with the decision of the United States Fifth Circuit Court of Appeal case of United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978), a case which is exactly on point with the instant case. However, the Eleventh Circuit completely ignored Fogelman, not referring to it in any way or attempting to distinguish it in the

opinion, notwithstanding that it is directly on point and controlling this case. In United States v. Fogelman, supra, the court held that exigent circumstances sufficient to allow a warrantless search of a truck were not present when the driver of the vehicle was in custody, the vehicle was legally parked and there were numerous officers around the premises so that access to the vehicle by others could be prevented. The court in Fogelman stated:

> With numerous officers around the premises and the two drivers in custody, there was no threat that the trucks were likely to be moved or their contents lost. 586 F.2d 337 at 342.

There are absolutely no distinguishing factors between Fogelman and the instant case. As a matter of fact, the government had a more compelling case for a warrantless search in Fogelman than existed in the instant case since the defendants in Fogelman apparently were in the parking lot near the truck that

was searched at the time said truck was seized. In contrast, in the instant case, the Petitioner was under constant surveillance miles away from the parking lot at the time his Ryder truck was seized.

An automobile may be searched without a warrant when there are both exigent circumstances and probable cause to believe the car contains articles that law enforcement officers are entitled to seize. Coolidge v. New Hampshire, 403 U.S. 443(1971); Chambers v. Maroney, 399 U.S. 42(1970); Carroll v. United States, 267 U.S. 132 (1925).

In the instant case, there was absolutely no exigent circumstances which existed at the time the police officers had finally obtained probable cause to search the Ryder truck. When the police officers finally had probable cause to search the truck, the Petitioner was not in the truck, was under surveillance miles away from the area where the truck was parked,

and the truck was legally parked in a parking area. This is simply not a situation involving the search and seizure of a motor vehicle without warrant on a public highway after a defendant has been stopped in the motor vehicle. Cf. Michigan v. Thomas, 102 S.Ct 3079 (1982); United States v. Ross, 456 U.S. 798 (1982).

Supreme Court rule 17(1) provides in part:

> A review on Writ of Certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.
>
> a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of

supervision...(Emphasis added)

The decision of the United States Circuit Court for the Eleventh Circuit in the instant case directly and expressly conflicts with the decision of the Fifth Circuit in United States v. Fogelman, supra. Furthermore, the decision in the instant case departs radically from prior federal decisions which recognize that a vehicle may be searched without a warrant only where at the time the vehicle was seized, there are both exigent circumstances and probable cause. Coolidge v. New Hampshire, supra,; Chambers v. Maroney, supra; Carroll v. United States, supra.

The instant decision completely abrogates the Fourth Ammendment with reference to the need of a police officer to obtain a search warrant prior to searching a vehicle in all situations. For all practical purposes, if this Honorable Court lets the decision of the Eleventh Circuit stand in this case, the re-

quirement for exigency prior to search will disappear completely in the Eleventh Circuit and have absolutely no meaning or import. The circuit court in the instant case has departed radically from the accepted and usual course of judicial proceedings related to the Fourth Amendment requirements for the search of parked and stationary vehicles. Furthermore, the decision in the instant case directly and expressly conflicts with the decision of the Fifth Circuit in United States v. Fogelman, supra. For these reasons, this Honorable Court should grant a Writ of Certiorari to review the decision below in the instant case.

CONCLUSION

For each of the following reasons, the Petitioner, CHRISTOPHER HALL, respectfully submits that the court should grant the Petition for Writ of Certiorari and enter an order

vacating the United States Circuit Court for the Eleventh Circuit's opinion and judgement below approving the warrantless search of the Petitioner's stationary and parked truck.

Dated: Winter Park, Florida

January 13, 1984

March ~~13~~ 14, 1984

Kirk N. Kirkconnell
Muller, Kirkconnell &
Lindsey, P.A.
1150 Louisiana Avenue,
Suite 1
P.O. Box 2728
Winter Park, FL 32790
305/645-3000

Attorney for the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the bar of this court and that I served the Petition for Writ of Certiorari to the United States Eleventh Circuit Court of Appeals on Respondent by placing three(3) copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

John E. Steele
Assistant United States Attorney
P.O. Box 600
Jacksonville, Florida 32201

All parties required to be served have been served. Done this 13th day of January 1984, and this 9th 14th day of March 1984.

/s/ JOHN T. SKOLFIELD, JR.

JOHN T. SKOLFIELD, JR.
501 Park Avenue South
Post Office Drawer 1510
Winter Park, FL 32790
305/647-1476

IN THE

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

NO. 82-3020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER HALL,

Defendant-Appellant

Non-Argument Calendar.

Oct. 3, 1983

Defendant was convicted before the United States District Court for the Middle District of Florida, Charles R. Scott, J., of possession of marijuana with intent to distribute, and he appealed. The Court of

Appeals, James C. Hill, Circuit Judge, held that: (1) where police officers concededly had probable cause to believe that truck rented by defendant contained marijuana, and, at the time officers seized the truck, there was still a danger that the vehicle or its contents would be moved before officers obtained a valid search warrant, exigent circumstances existed, and the warrantless search of the truck did not violate the Fourth Amendment; (2) evidence in suppression hearing sustained finding that defendant's statements to police officers were spontaneous and not the product of interrogation; and (3) evidence sustained conviction.

Affirmed.

1. CRIMINAL LAW 1036.1(2)

Defendant whose trial counsel did not file any objections to magistrate's report and recommendation within time periods es-

tablished by statute and local rule did not thereby waive the right to appeal district court's suppression rulings, but defendant could challenge the findings of fact only under a plain error standard. 28 U.S.C.A. 636; U.S. Dist. Ct. Rules M.D. Fla., General Rule 6.02.

2. SEARCHES AND SEIZURES 7(26, 29)

In order to have standing to assert a Fourth Amendment right, a person must have a reasonable expectation of privacy in the item searched; defendant bears burden of showing that he possesses a privacy interest. U.S.C.A. Const. Amend. 4.

3. SEARCHES AND SEIZURES 7(26)

Traditional or common-law theories of property rights do not automatically confer standing to challenge a search. U.S.C.A.Const. Amend. 4.

4. SEARCHES AND SEIZURES 7(26)

Where the defendant had rented truck for a period which had not expired when agents searched the truck, defendant had legally parked the truck at shopping center and never denied ownership of the truck, and when first stopped by police officers, defendant told officers that the truck belonged to him, defendant did not abandon the truck by leaving it parked at shopping center, and thus defendant had standing to challenge the search of the truck. U.S.C.A. Const. Amend. 4.

5. SEARCHES AND SEIZURES 3.3(6,7)

Government agents may search an automobile without a warrant if they can establish probable cause and exigent circumstances; exigency must be determined at the time of the seizure of an automobile, not at the time of its search. U.S.C.A. Const. Amend. 4.

6. SEARCHES AND SEIZURES 7(20)

Where police officers concededly had probable cause to believe that truck rented by defendant contained marijuana, and, at the time officers seized the truck, there was still a danger that the vehicle or its contents would be moved before officers obtained a valid search warrant, exigent circumstances existed, and the warrantless search of the truck did not violate the Fourth Ammendment. U.S.C.A. Const., Amend. 4.

7. CRIMINAL LAW 412.1(1)

District court need not suppress spontaneous remarks which are not the product of interrogation.

8. CRIMINAL LAW 414

Evidence in suppression hearing sustained finding that defendant's statements to police officers were spontaneous and not the

product of interrogation.

9. CRIMINAL LAW 1159.2(7)

Evidence is sufficient if, when viewed in light most favorable to government and drawing all inferences and making credibility choices supporting the verdict, a reasonable jury could have found defendant guilty beyond a reasonable doubt.

10. DRUGS AND NARCOTICS 123

Evidence in prosecution for possession of marijuana with intent to distribute sustained conviction.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL, JOHNSON and HENDERSON, Circuit Judges. JAMES C. HILL, Circuit Judge:

In this direct appeal from a criminal conviction for possession of marijuana with the intent to distribute, Christopher Hall challenges the district court's refusal to supress certain evidence and the sufficiency of the evidence supporting his conviction. Finding no merit in any of defendant's contentions, we affirm.

Viewing the evidence in the light most favorable to the government, United States v. Pierre, 688F.2d 724,725 (11th Cir. 1982), the record indicates that DEA agents began following James Wolfe, a suspected drug smuggler and dealer, as he arrived at Tampa International Airport. Wolfe departed the airport in a gray Buick Riviera and arrived at the Econo Travel hotel in Sarasota shortly after 1:00 a.m. on July 29, 1982. At the time, agents observed a Ryder Truck located in the southeast corner of the parking lot. Defendant had rented the truck on July 28 and

had agreed to return it on July 30. The Riviera left the Econo Lodge at approximately 2:30 a.m. but returned at about 10:30 a.m. Shortly thereafter, the individuals in the Riviera went to the truck. An individual, identified as defendant, entered the truck's cab and pulled away behind the Riviera. The truck and the Riviera took "what seemed to be evasive actions looking for surveillance..."

Agents followed the two vehicles to a private residence located south of Coleman, Florida. While agents met at a small park approximately one mile north of the residence, a black Cadillac, registered to defendant's father, Bernie Hall, drove slowly by the agents. The Cadillac then returned to the residence. Five or ten minutes later, the Ryder Truck left the residence followed closely by a blue Chevrolet registered to defendant's brother, James Hall. The truck, driven by defendant, began exceeding the 55 mph speed

limit, while the Chevrolet was traveling at 30-40 mph. Consequently, the truck began outdistancing the surveillance unit which was following the two vehicles. The Chevrolet thwarted repeated efforts by the surveillance unit to pass the Chevrolet by crossing the center line. The agents eventually passed the Chevrolet and, traveling 75-80 mph, caught up with the truck. Upon approaching the truck, the Chevrolet began flashing its headlights on and off.

The truck proceeded to the Lake Hills Shopping Center where defendant parked the vehicle in an isolated area and proceeded to a nearby McDonald's restaurant. Defendant Hall remained in the restaurant for approximately one hour, always in view of the truck. DEA Agent Adams decided to enter the restaurant. While walking by the truck, she smelled the odor of marijuana emanating from the vehicle. Hall then left the restaurant, made several

phone calls, waited for approximately forty-five minutes (facing the parked truck), was met by a white car which he entered, and departed. Authorities followed the white car.

Upon orders from DEA agent Adams, a uniformed Florida Highway Patrol trooper stopped the white car to identify Hall. Defendant identified himself and was advised of his Miranda rights. The officers permitted Hall to leave but were then told to return him to the shopping center. The officers told Hall that he was not under arrest at that time but suggested that he return to the parking lot. Hall agreed to return; he was not arrested, handcuffed or searched but was not free to leave.

Arriving at the truck Hall approached Agent Serra and asked the agent what he smelled. When Agent Serra asked for the keys to the truck, Hall indicated that he did not have the

keys. Hall held out his hands simulating the handcuff position and said, "arrest me, arrest me." Hall volunteered that he could not smell marijuana. The district court found as matter of fact that these remarks were unsolicited and not a result of questioning.

Agent Serra obtained a tire tool in order to remove the lock but found the tool unnecessary since the lock was turned upside down and had never latched. Upon opening the unlocked door, agents saw approximately 3,000 pounds of marijuana.

(1) As a preliminary matter, the government asserts that defendant waived, as a matter of law, any appellate review review of the district court's order refusing to suppress the marijuana and certain statements. Hall's trial counsel did not file any objections to the magistrate's report and recommendation within the time period set forth in footnote 1 of the report as required under 28 U.S.C. 636 (1976) and Local Rule 6.02. In United States v.

Lewis, 621 F.2d 1382, 1386(5th Cir. 1980), cert. denied, 450 U.S. 935, 101 S. Ct. 1400, 67 L.Ed. 2d 370(1981), the court held that the defendant's failure to file a timely objection to the magistrate's report and recommendation barred appellate review of those issues. The en banc court, however, modified this rule in Nettles v. Wainwright, 677 F.2d404,410(5th Cir. Unit B 1982), holding that appellant's failure to object "bar(s) the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except on grounds of plain error or manifest injustice."

In Hardin v. Wainwright, 678F.2d 589, 591(5th Cir. Unit B 1982), the court stated that the holding in Nettles substantially modified the rule articulated in Lewis. "The failure to object no longer waives the right to appeal but simply limits the scope of appellate review of factual finding to a plain error review; no limitation of the review

of legal conclusion results." Id: see United States v. Warren, 687 F.2d 347(11th Cir. 1982). We conclude that Hall has not waived his right to appeal the district court's suppression rulings but may challenge the district court's findings of facts only under a plain error standard.

(2) Hall argues that he has standing to challenge the search of the truck. In order to have standing to assert a fourth amendment right, a person must have a reasonable expectation of privacy in the item searched. Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58L.Ed. 2d 387(1978): United States v. Long, 674F.2d848,852 (11th Cir. 1982) The defendant bears the burden of showing that he possesses a privacy interest. Rakas v. Illinois, 439 U.S. at 130 n. 1, 99 S. Ct. at 424 n.1. The government argues, and the district court held, that Hall abandoned his reasonable expectation of privacy by leaving

the truck parked at the shopping center.

(3) We disagree. Defendant had rented the Ryder truck for a period which had not expired when agents searched the vehicle. We recognize that "(t)raditional or common law theories of property rights do not automatically confer standing to challenge a search." United States v. Dyar, 574 F.2d 1385, 1390 (5th Cir. 1978), cert denied, 439 U.S. 982, 99 S.Ct. 570, 58 L.Ed.2d 653 (1978). Defendant had legally parked the truck and never denied ownership of the truck. When first stopped by officers, appelant told Agent Richards that the truck parked at the shopping center belonged to him.

(4) In concluding that defendant had abandoned the truck, the magistrate emphasized that Hall probably knew that the government agents had followed the truck before parking at the shopping center. The magistrate also noted that Hall did not possess keys either

to the cab or the storage area. Unlike the situation presented in United States v. Williams, 569 F2d 823(5th Cir. 1978), Hall parked the vehicle in a legal parking space in a shopping center: he did not detach a part of the truck in a rest area. Based on an objective view of the facts as found by the magistrate, we conclude that Hall did not abandon the Ryder truck and possessed a reasonable expectation of privacy in the truck.

Appellant contends that the district court erred in concluding that the officers did not violate the fourth amendment in conducting a warrantless search of the truck. Hall concedes that the officers had probable cause to believe that the truck contained marijuana. Appellant's Brief at 23. Appellant contends that the officers, nevertheless, should have obtained a warrant prior to searching the truck.

(5,6) Government agents may search an automobile without a warrant if they can establish probable cause and exigent circumstances. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26L.Ed.2d 419 (1970): Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543(1925). In United States v. Ross, 456 U.S. 798, 807 n. 9, 102 S.Ct. 2157, 2163 n.9, 72L.Ed.2d 572 (1982), the Supreme Court noted that "if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle." Exigency must be determined at the time of the seizure of an automobile, not at the time of its search. United States v. McBee, 659 F.2d 1302, 1305(5th Cir. Unit B 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2020, 72L.Ed 2d 474(1982): United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976), cert.

denied. 430 U.S. 945, 97 S.Ct. 1578, 51 L.Ed.2d 792 (1977). At the time law enforcement officials seized Hall's truck, there may still have been a danger that the vehicle or its contents would be moved before the officers obtained a valid search warrant. See United States V. Chadwick, 433 U.S. 1, 13 n. 7, 97 S.Ct. 2476, 2484 n. 7, 53 L.Ed.2d 538 (1977); Chambers v. Maroney, 399 U.S. at 52, 90 S.Ct. at 1981-1982; United States v. McBee, 659 F.2d at 1306. "(W)arrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cody v. Dombrowski,413 U.S. 433, 441-42, 93 S.Ct. 2523,2528,37 L.Ed.2d 706 (1973). The procedures used by the authorities in searching Hall's vehicle were reasonable and satisfied the fourth amendment.

(7,8) Appellant asserts that the district court should have suppressed all of appellant's statements made after he returned to the shopping center. The district court suppressed all statements except defendant's self-identification to Agent Shriver and defendant's spontaneous remarks made upon his return to the shopping center. The magistrate found that defendant's remarks were unsolicited and not the product of questioning. A district court need not suppress spontaneous remarks which are not the product of "interrogation." Rhode Island v. Innis, 446 U.S. 291, 300,100 S.Ct. 1682, 1689, 64 L. Ed.2d 197 (1980). The evidence in the record clearly supports the magistrate's conclusion that Hall's statements were spontaneous. See United States v. Espinosa-Orlando, 704 F.2d 507,513-14(11th Cir. 1983). We conclude that the district court correctly refused to suppress Hall's identification and

spontaneous remarks made upon his return to the shopping center.

(9,10) Finally, appellant urges that the evidence was insufficient to sustain his conviction. Evidence is sufficient if, when viewed in the light most favorable to the government and drawing all inferences and making credibility choices supporting the verdict, a reasonable jury could have found the defendant guilty beyond a reasonable doubt. United States v. Castaneda-Reyes, 703 F.2d 522, 524(11th Cir. 1983); United States v. Pierre, 688 F.2d 724, 725 (11th Cir. 1982). We have carefully reviewed the record and conclude that the evidence was clearly sufficient to support the jury's verdict. The judgement of the district court is AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

No. 83-3020

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

CHRISTOPHER HALL,

Defendant-Appellant.

Appeal from the United States District Court

for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
Opinion October 3, 1983 , 11 Cir., 198_, ___F. 2d_____).

(Nov. 17, 1983)

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on t-e reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ JAMES C. HILL
United States Circuit Judge

No 83-1527

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a warrantless search of petitioner's truck violated his Fourth Amendment rights because exigent circumstances precluding an application for a warrant did not exist at the time of the search.

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OCTOBER TERM, 1983

No. 83-1527

CHRISTOPHER HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 716 F.2d 826.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1983. A petition for rehearing was denied on November 17, 1983. The petition for a writ of certiorari was filed on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A19).

The pertinent evidence is summarized in the opinion of the court of appeals (Pet. App. A7-A11). On the evening of July 28, 1982, DEA agents in Tampa, Florida, placed James Wolfe, a suspected drug smuggler and dealer, under observation after Wolfe arrived in Tampa on a flight originating in Minneapolis. Upon landing, Wolfe hailed a cab, which took him to a gas station in Sarasota, where he placed a telephone call (S.H. Tr. 50-56; Tr. 72-77).[1] Shortly after midnight, Wolfe left the gas station in a gray Buick that agents later determined was registered to petitioner. An hour later, the Buick arrived at an Econo Lodge Motel in Sarasota and was parked near a Ryder Rental Truck that petitioner had rented the day before (S.H. Tr. 57-59, 65; Tr. 77-80, 86).

At 2:30 a.m. on July 29, 1982, an unidentified person drove the Buick from the motel to a residence on Siesta Key, returning to the motel at 10:30 a.m. Later that morning, two men drove the Buick to the motel office. Agents observed petitioner leave the car and enter the office. After petitioner re-entered the car, the two men drove to a nearby restaurant and then returned to the motel parking lot. Petitioner then left the Buick and entered the Ryder truck. The Buick and the truck then were driven to a private residence south of Coleman, Florida (S.H. Tr. 60-67, 184, 187; Tr. 81-88, 108-109).

As the surveillance agents conferred in a nearby roadside park, a black Cadillac registered to petitioner's father left the residence and drove slowly around the agents' cars before returning to the house (S.H. Tr. 68; Tr. 88-89, 138). Five or ten minutes later, the Ryder truck, driven by petitioner, and a blue Chevrolet registered to petitioner's

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[1] "S.H. Tr." refers to the transcript of the suppression hearing; "Tr." denotes the trial transcript.

brother were seen leaving the residence. Petitioner soon exceeded the 55 mph speed limit, but surveilling agents were unable to follow him because of obstructive maneuvers by the Chevrolet. The agents eventually were able to pass the Chevrolet, caught up with the truck, and followed it to a shopping center in Eustis, Florida (S.H. Tr. 68, 78-83; Tr. 119-124).

Petitioner parked the truck in an isolated area of the parking lot and entered a nearby McDonald's restaurant (S.H. Tr. 83-84; Tr. 125). While petitioner sat in the restaurant, keeping the truck in view, DEA Agent Adams walked past the rear of the truck and smelled the odor of marijuana. She then returned to her car and advised DEA Agent Serra of her discovery. Serra left the parking lot to call the United States Attorney.

After an hour, petitioner left the restaurant and made several telephone calls at the shopping center. Forty-five minutes later, an individual in a white car arrived at the parking lot, picked up petitioner, and drove off. All surveilling agents but one, who was posted to maintain guard over the truck, followed the white car. Agent Adams asked a Florida Highway Patrol trooper to stop the white car so that he could ascertain petitioner's identity (S.H. Tr. 164-166; Tr. 142-144). After petitioner identified himself, the trooper at first permitted him to leave, but then stopped the vehicle a second time at Agent Serra's direction. The agents then advised petitioner that he was not under arrest but requested that he nonetheless return to the parking lot. Petitioner agreed to do so (S.H. Tr. 12-19, 88-89, 92-94, 166; Tr. 127-128, 144, 159).

Approaching the truck, petitioner asked Agent Serra what he smelled and he held out his hands, simulating the handcuff position, saying "arrest me, arrest me." Serra then opened the rear door of the truck, revealing approximately 3000 pounds of marijuana (S.H. Tr. 94-96; Tr. 129-134).

ARGUMENT

Petitioner does not question that there was probable cause to believe that the truck contained marijuana. Rather, because he was under surveillance from the time agents acquired probable cause to search the truck until they actually conducted the search several hours later, petitioner contends (Pet. 11-16) that there was no danger that the truck might be moved or the contraband destroyed pending acquisition of a search warrant and that the warrantless search of the truck accordingly was impermissible. Petitioner's claim is meritless.

1. a. Contrary to petitioner's apparent submission (Pet. 13), the automobile search exception to the Fourth Amendment warrant requirement does not require a showing of exigent circumstances at the time of the *search* or that it was infeasible to obtain a warrant by the time the search was conducted. The inherent mobility of motor vehicles is often cited as a basis for the auto search doctrine, which permits warrantless probable cause searches of motor vehicles. As the court of appeals recognized (Pet. App. A16), however, it is well established that it is the mobility of the vehicle at the time of the seizure, rather than at the time of the search that is the predicate for the application of the automobile exception. See *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). Moreover, this Court has also recognized a second rationale for the auto search doctrine — the owner's dimished expectation of privacy in an automobile — that justifies "warrantless searches of vehicles * * * in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed [are] remote, if not nonexistent." *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973). Accordingly, the court of appeals correctly recognized that there was no need

for the government to demonstrate that exigent circumstances requiring an immediate search prevailed at the time of the warrantless search at petitioner's truck. Moreover, "[i]t is no answer to say that the [agents] could have obtained a search warrant, for '[t]he relevant test is not whether it [was] reasonable to procure a search warrant, but whether the search was reasonable.' " *Cooper* v. *California*, 386 U.S. 58, 62 (1967), quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950).

b. Petitioner argues (Pet. 13-14) that there was no justification for the warrantless search here because, at the time his truck was seized, it had already been effectively immobilized because the truck was parked and he was under police surveillance. The court of appeals determined, however, that "[a]t the time law enforcement officials seized [petitioner's] truck, there may still have been a danger that the vehicle or its contents would be moved before the officers obtained a valid search warrant" (Pet. App. A17). There is no warrant for further review of this fact-bound determination. In any event, because the record clearly reveals that petitioner was associated with a number of confederates—and appears to have alerted them by telephone that he was (or suspected he was) under police surveillance — the court of appeals' assessment of the situation is sound.[2]

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[2]The court of appeals did not indicate whether, in its view, petitioner's vehicle had been effectively seized prior to the time it was searched by Agent Serra. Nor does petitioner address this question. But even if the seizure was coincident with the initiation of the search — the interpretation of the facts most favorable to petitioner — the warrantless search was justified because the possibility that the truck or the contraband might be moved before a warrant could be obtained persisted up until the point of the search.

We note that, because the court of appeals justifiably found a continuing risk of loss of the vehicle or evidence at the time the vehicle was seized, this case does not present any question as to whether, in the absence of any such possibility, a warrantless search may be justified

2. Petitioner claims (Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Fogelman*, 586 F.2d 337, 342-343 (5th Cir. 1978), in which an exigent circumstances rationale for a warrantless search of two trucks was rejected because the drivers were in custody and the vehicles surrounded by numerous officers at the time of the *seizure*.[3] As noted above, the record of the present case, by contrast, does not reveal that agents had such absolute control of the situation as to eliminate all exigency considerations at the time of the seizure of the vehicle. In any event, as the Fifth Circuit subsequently recognized, *Fogelman* takes an unduly restrictive view of the ambit of the automobile search doctrine that is inconsistent with this Court's recent automobile search decisions. See *United States* v. *McBee*, 659 F.2d 1302, 1305 & n.3 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Accordingly, no conflict of decision warranting further review is presented.

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solely on the basis of the diminished expectation of privacy that individuals enjoy in their automobiles. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 458-462 (1971). The court of appeals' opinion thus does not join issue on petitioner's implicit contention that a showing of exigency or mobility prevailing at the time of a seizure remains essential to the automobile exception to the warrant requirement.

[3]The warrantless search in *Fogelman* was upheld on alternative grounds. The court's discussion of the auto search doctrine accordingly was unnecessary to the decision and may be considered dictum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

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